NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 1578

TERRLYN TROTTER AS SURVIVING PARENT OF BRENTON MIKAL TROTTER

VERSUS

BATON ROUGE GENERAL MEDICAL CENTER, EFFIE BRANTON-ANDERS, M.D., STATE OF LOUISIANA THROUGH THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY THROUGH THE LSU HEALTH CARE SERVICES DIVISION OBO EARL K. LONG HOSPITAL, ROY J. CULOTTA, M.D., JOHN R. GODKE, M.D., STEVEN J. ZUCKERMAN, M.D., THOMAS JEIDER, M.D., CHRISTOPHER THOMAS, M.D., AND DUSTIN VINCENT, M.D.

DATE OF JUDGMENT: AUG 05 2016

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 633096, SECTION 25, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

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Terrlyn Trotter Lafayette, Louisiana	Plaintiff-Appellant In Proper Person
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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

Disposition: AFFIRMED.

CHUTZ, J.

In this medical malpractice case, plaintiff-appellant, Terrlyn Trotter, appeals a summary judgment dismissing her claims against defendant-appellee, Steven J. Zuckerman, M.D. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On November 5, 2011, Brenton Mikal Trotter, a twenty-one-year-old man who suffered from several chronic health conditions, including autism, hypothyroidism, and growth hormone deficiency, was transported by EMS to the emergency room at the Baton Rouge General Medical Center (BRGMC) after he reportedly suffered a seizure and became unresponsive. Dr. Effie Branton-Anders was the emergency room physician who treated Mr. Trotter upon his arrival at the BRGMC. At that time, Mr. Trotter was noted to be in cardiac arrest and was resuscitated. Mr. Trotter subsequently was admitted to the BRGMC intensive care unit (ICU) in critical condition. After his transfer to the ICU, Mr. Trotter was found to have no pulse and was again resuscitated. On November 7, 2011, Mr. Trotter was examined by Dr. Zuckerman, a neurologist. On that date, Mr. Trotter was declared brain dead, and he subsequently expired.

In October 2012, Terrlyn Trotter, Brenton Trotter's mother, filed a medical malpractice claim with the Louisiana Patient's Compensation Fund Oversight Board requesting review by a medical review panel pursuant to La. R.S. 40:1299.41 *et seq.*[1] Dr. Zuckerman was one of several health care providers named in Ms. Trotter's complaint. On April 30, 2014, the medical review panel issued a unanimous opinion in favor of the named health care providers, including Dr. Zuckerman, finding no deviation from the applicable standard of care relative to Mr. Trotter's treatment. Ms. Trotter, in proper person, filed a medical

[1] All references to provisions of Title 40 of the Louisiana Revised Statutes are to those provisions as they existed prior to the reorganization of Chapter 5 of Title 40 by House Concurrent Resolution No. 84 of the 2015 Regular Session. See Editors' Notes to La. R.S. 40:1231.1 (formerly La. R.S. 40:1299.41).

malpractice suit in the 19th Judicial District Court against Dr. Zuckerman and several other defendants on August 28, 2014.[2] Dr. Zuckerman filed an answer denying the allegations of Ms. Trotter's petition. Thereafter, on February 26, 2015, Dr. Zuckerman filed a motion for summary judgment on the grounds that because Ms. Trotter had failed to obtain a medical expert to support her claims, she would be unable to sustain her burden of proving he had breached the applicable standard of care. Several days before the scheduled hearing, Ms. Trotter filed a motion for continuance, which the trial court denied. After the matter came on for hearing, the trial court granted summary judgment in favor of Dr. Zuckerman and dismissed Ms. Trotter's claims against him, with prejudice. Ms. Trotter has now appealed.

LAW AND ANALYSIS

On appeal, Ms. Trotter asserts the trial court erred in granting summary judgment in favor of Dr. Zuckerman since his "first and only contact with [Mr. Trotter] was nearly 48 [hours] after [Mr. Trotter's] admission according to the records."[3] She does not expand on this argument in brief. However, based on the

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[2] The BRGMC and Dr. Effie Branton-Anders were named as additional defendants. On April 16, 2015, the trial court signed a summary judgment dismissing Ms. Trotter's lawsuit against the BRGMC, with prejudice; that judgment is the subject of the appeal taken to this court by Ms. Trotter in docket number 2015-CA-1577. On May 8, 2015, the trial court signed a summary judgment in favor of Dr. Branton-Anders, dismissing Ms. Trotter's lawsuit against her, with prejudice; that judgment is the subject of the appeal taken to this court by Ms. Trotter in docket number 2015-CA-1579.

Also named as defendants in the lawsuit were the State of Louisiana through the Board of Supervisors of Louisiana State University through the LSU Health Care Services Division on behalf of Earl K. Long Hospital, Roy J. Culotta, M.D., John R. Godke, M.D., Dustin Vincent, M.D., Thomas Jeider, M.D., and Christopher Thomas, M.D. (collectively, "the LSU defendants"). The trial court signed a judgment on April 16, 2015, that granted summary judgment dismissing the LSU defendants from Ms. Trotter's lawsuit, with prejudice. That judgment was the subject of the appeal taken to this court by Ms. Trotter in docket number 2015-CA-1576. That appeal was dismissed by order of this court on December 29, 2015, due to Ms. Trotter's failure to file a brief within thirty days of the mailing of a notice of abandonment.

[3] Ms. Trotter filed an identical brief in each of the three appeals pending before us. Thus, in each of these appeals, she raised the same assignments of error regardless of whether those assignments were pertinent to the judgment under review in that particular appeal. Several of Ms. Trotter's assignments relate specifically to only one or more of the named defendants and will be pretermitted in each appeal in which they are not relevant. In the instant appeal, we

allegations in her petition, as well as her opposition to the motion for summary judgment, it appears to be Ms. Trotter's position that Dr. Zuckerman was negligent: in failing to examine Mr. Trotter in a timely manner; in failing to properly evaluate, diagnose, and treat Mr. Trotter; in failing to properly review Mr. Trotter's medical records or give consideration to his past medical history; and in failing to disclose appropriate medical information to Mr. Trotter's family. Ms. Trotter contends her familiarity with her son's medical requirements makes her "fully capable of meeting her burden [of proof] at trial" even in the absence of a medical expert. She further maintains that expert testimony is not required in this case because a layperson could infer negligence from the facts.

A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).[4] On appeal, appellate courts review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the district court's consideration of whether summary judgment is appropriate. ***Schultz v. Guoth***, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005.

On a motion for summary judgment, the burden of proof is on the mover. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial, the mover's burden does not require that all essential elements of the

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pretermit assignments of error numbers one through five and supplemental assignment of error number one since they are irrelevant to the claims made against Dr. Zuckerman.

Additionally, we note that the assignments of error that relate to the LSU defendants will not be considered by this court in the present appeal or any of the above-referenced appeals since we dismissed the appeal seeking review of the summary judgment rendered in favor of the LSU defendants, and Ms. Trotter did not request a rehearing or seek a writ of certiorari to the Louisiana Supreme Court. Accordingly, the summary judgment rendered in favor of the LSU defendants is not final and definitive. See La. C.C.P. art. 2166(A).

[4] All references made to La. C.C.P. art. 966 are made to the version of that article that existed prior to its amendment by 2015 La. Acts, No. 422, § 1, eff. 1/1/16.

adverse party's claim be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. C.C.P. art. 966(C)(2); ***Schultz***, 57 So.3d at 1007. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. ***Cason v. Saniford***, 13-1825 (La. App. 1st Cir. 6/6/14), 148 So.3d 8, 11, writ denied, 14-1431 (La. 10/24/14), 151 So.3d 602.

A plaintiff in a medical malpractice action is required to establish: (1) the standard of care applicable to the doctor; (2) a violation by the doctor of that standard of care; and (3) a causal connection between the doctor's alleged negligence and the plaintiff's injuries. La. R.S. 9:2794(A); ***Pfiffner v. Correa***, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233; ***Schultz***, 57 So.3d at 1006. The standard of care is generally that degree of knowledge or skill possessed or the degree of care ordinarily exercised by doctors licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances. La. R.S. 9:2794(A)(1); ***Lugenbuhl v. Dowling***, 96-1575 (La. 10/10/97), 701 So.2d 447, 456.

Generally, expert testimony is required to establish the applicable standard of care and whether that standard was breached, except where the negligence is so obvious that a layperson can infer negligence without the guidance of expert testimony.[5] ***Samaha v. Rau***, 07-1726 (La. 2/26/08), 977 So.2d 880, 884; ***Pfiffner***,

[5] Examples of the type of cases in which layman can infer negligence include a physician fracturing a patient's leg during examination, amputating the wrong limb, dropping a knife or

643 So.2d at 1233. Additionally, expert medical evidence typically also is required to establish a causal connection between the breach of the standard of care and the patient's injury. ***Pfiffner***, 643 So.2d at 1233-34; ***Schultz***, 57 So.3d at 1009. Normally, in cases such as the present one involving patients with complicated medical histories and complex medical conditions, causation is simply beyond the province of lay persons to assess without the assistance of expert medical testimony. See ***Pfiffner***, 643 So.2d at 1234; ***Jackson v. Suazo-Vasquez***, 12-1377 (La. App. 1st Cir. 4/26/13), 116 So.3d 773, 776. The requirement of producing expert medical testimony is particularly apt when the defendant has supported his motion for summary judgment with expert opinion evidence that the treatment at issue met the applicable standard of care. ***Fagan v. LeBlanc***, 04-2743 (La. App. 1st Cir. 2/10/06), 928 So.2d 571, 575-76.

In this case, Dr. Zuckerman's motion for summary judgment was based on the total absence of any expert medical testimony to support Ms. Trotter's allegations that he breached the applicable standard of care or to establish a causal connection between the alleged breach and any injury to Mr. Trotter. Even though Dr. Zuckerman would not bear the burden of proof at trial, in support of his motion for summary judgment, he offered the opinion of the medical review panel that was rendered in his favor.[6] In its unanimous opinion, the medical review panel concluded the evidence did not support a breach of the standard of care by Dr. Zuckerman, stating:

> Dr. Zuckerman, a neurologist, read the EEG accurately and made a proper decision regarding the diagnosis of brain death in this case. After reading [Ms. Trotter's] submission, it should be noted that the records show that Dr. Zuckerman examined the patient, read the EEG, and his findings were consistent with brain death. Dr. Zuckerman,

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scalpel on a patient, or leaving a sponge in a patient's body. See ***Samaha***, 977 So.2d at 884; ***Pfiffner***, 643 So.2d at 1233.

[6] A medical review panel opinion is admissible expert medical evidence that may be used to support or oppose any subsequent medical malpractice suit. La. R.S. 40:12319(H); ***Samaha***, 977 So.2d at 890.

> like Dr. Culotta and Dr. Godke [two other defendant physicians], who made the initial brain death determination, all did so according to AAN [American Academy of Neurology] guidelines and exceeded them in some respects.

Contrary to appellant's claim that an expert was unnecessary in this case due to Dr. Zuckerman's obvious negligence, we find a medical expert was required. Because of Mr. Trotter's multiple pre-existing conditions, his case was medically complicated. Whether or not Dr. Zuckerman breached the applicable standard of care and whether that breach caused or contributed to Mr. Trotter's death or the loss of a chance of survival turns on complex medical issues, including the timing of Dr. Zuckerman's examination of Mr. Trotter, the interpretation of the EEG, whether the determination of brain death was proper, and the application of AAN guidelines. It is clearly beyond the ability of laymen to make such determinations unassisted by expert medical testimony. See ***Schultz***, 57 So.3d at 1008-09. Accordingly, we reject Ms. Trotter's arguments that no expert medical testimony was needed in this case and that she would be able to sustain her burden of proof at trial because she was "very well familiarized" with her son's medical requirements.

Since Dr. Zuckerman would not bear the burden of proof at trial, once he pointed out the absence of expert medical testimony to establish the essential elements of a breach of the applicable standard of care and causation, the burden of proof shifted. At that point, Ms. Trotter was required to produce expert medical testimony sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial. La. C.C.P. art. 966(C)(2); ***Schultz***, 57 So.3d at 1009-10.

Ms. Trotter failed to meet this burden. At the hearing, for the first time, she identified her son's former neurologist, Dr. Benedict Idowu, as her purported medical expert. However, upon questioning by the trial court, it became clear that Ms. Trotter had not spoken directly to Dr. Idowu about testifying as her expert,

although she asserted that she spoke to his office manager about the matter and had provided him with Mr. Trotter's medical records. Ms. Trotter produced no expert report from Dr. Idowu, nor any evidence that he had been retained by her or even that he was willing to give an expert opinion in this matter. Nor did she present any other expert medical testimony in support of her claims. Accordingly, Ms. Trotter failed to satisfy her burden of proof. She failed to present any expert medical testimony to establish any genuine issue of material fact with regard to whether Dr. Zuckerman breached the applicable standard of care in his treatment of Mr. Trotter or whether a causal connection existed between the alleged breach and any injury to Mr. Trotter. See La. C.C.P. art. 966(C)(2); ***Schultz***, 57 So.3d at 1009-10; ***Cherry v. Herques***, 623 So.2d 131, 134 (La. App. 1st Cir. 1993). The trial court properly granted summary judgment dismissing this claim against Dr. Zuckerman.

In addition to her lack of skill complaint against Dr. Zuckerman, Ms. Trotter also alleged in her petition that Dr. Zuckerman was negligent in "[f]ailing to disclose appropriate medical information to the family." On appeal, she assigned error to the trial court's failure to find that violations of the informed consent law occurred under La. R.S. 40:1299.40 *et seq.*[7] She contends no expert medical testimony is necessary to establish medical malpractice based on violations of the informed consent law.

In order to prevail on a lack of informed consent claim, a plaintiff must prove not only that the physician failed to disclose all material information, but also that there was a causal connection between the physician's failure to disclose information and the damages claimed. ***Lugenbuhl***, 701 So.2d at 454. At the time that the instant claim arose, some expert medical testimony was necessary to establish the existence and nature of the material risks that should be disclosed to a

[7] The Louisiana Informed Consent Law presently is found at La. R.S. 40:1157.1 *et seq.*

patient, because only a physician or other qualified expert is capable of judging what risks exist and the likelihood of their occurrence.[8] ***Brandt v. Engle***, 00-3416 (La. 6/29/01), 791 So.2d 614, 620; ***Hondroulis v. Schuhmacher***, 553 So.2d 398, 412 (La. 1988) (on rehearing).

In this case, Ms. Trotter has made only a vague allegation that Dr. Zuckerman failed to disclose "appropriate medical evidence," without specifying any particular information that he should have disclosed to her. Further, Ms. Trotter has failed to produce any medical evidence to show the existence of any material risks that Dr. Zuckerman failed to disclose. Ms. Trotter also failed to present any evidence to establish a causal connection between any non-disclosed risks and the damages she claimed. Without such evidence, Ms. Trotter will be unable to meet her evidentiary burden at trial. See ***Suarez v. Mando***, 10-853 (La. App. 5th Cir. 3/29/10), 62 So.3d 131, 135-36, writ denied, 11-0885 (La. 6/17/11), 63 So.3d 1036; ***Tompkins v. Bryan***, 42,874 (La. App. 2d Cir. 2/6/08), 975 So.2d 723, 726.

Lastly, we find no merit in Ms. Trotter's complaint that the trial court erred in not allowing her more time to obtain an expert opinion. She asserts in brief that she should have been given additional time to "'close' a deal" with the one independent expert witness she located who was willing to work with a pro se litigant after her "diligent 3 year effort" to locate an expert.

The record reflects that Dr. Zuckerman propounded interrogatories to Ms. Trotter on October 6, 2014, requesting the name and specialty of any expert witness she intended to present at trial on the issue of whether Dr. Zuckerman breached the applicable standard of care. No response was received from Ms.

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[8] In 2012, the legislature enacted La. R.S. 40:1299.39.6 (redesignated as La. R.S. 40:1157.2 by House Concurrent Resolution No. 84 of the 2015 Regular Session). This provision created the Louisiana Medical Disclosure Board for the purpose of determining "which risks and hazards related to medical care and surgical procedures must be disclosed by a physician or other health care provider to a patient or person authorized to consent for a patient ...."

Trotter, and additional copies of the interrogatories were provided to her on November 17, 2014, and January 20, 2015. Dr. Zuckerman filed his motion for summary judgment in February 2015, and it was set for hearing on April 13, 2015. Three days before the scheduled hearing date, Ms. Trotter filed a motion for continuance, stating that further discovery was necessary to obtain the depositions of Mr. Trotter's former neurologist, Dr. Idowu, as well as the deposition of her son's former endocrinologist (unidentified by name in the motion for continuance). However, she did not advise the trial court of any steps taken by her to notice the depositions of either of these physicians or why she had not done so earlier. (R-197) The trial court denied the motion for continuance.

It is not an abuse of a trial court's wide discretion to entertain a motion for summary judgment before discovery has been completed. In such instances, the trial court has discretion to render summary judgment, if appropriate, or to allow further discovery. Although the parties must be given the opportunity to conduct "adequate discovery" to present their claims, there is no absolute right to delay action on a motion for summary judgment until discovery is complete. La. C.C.P. art. 966(C)(1); ***Ellis v. Louisiana Board of Ethics***, 14-0112 (La. App. 1st Cir. 12/30/14), 168 So.3d 714, 725 (per curiam), writ denied, 15-0208 (La. 4/17/15), 168 So.3d 400. The trial court's ruling on a motion for continuance should not be disturbed on appeal in the absence of a clear abuse of discretion. ***St. Tammany Parish Hospital v. Burris***, 00-2639 (La. App. 1st Cir. 12/28/01), 804 So.2d 960, 963.

At the time that Dr. Zuckerman filed his motion for summary judgment in February 2015, over three years had elapsed since Mr. Trotter's death in November 2011, over two years had elapsed since Ms. Trotter filed her request that a medical review panel review her claim against Dr. Zuckerman, and more than ten months had elapsed since the opinion of the medical review panel favorable to Dr.

Zuckerman was rendered in April 2014. Therefore, Ms. Trotter had ample time to familiarize herself with the issues involved in this matter and to search for a medical expert to support her claims. In fact, she admitted that she had been searching for an expert for three years. Nevertheless, there is no indication that Ms. Trotter requested any discovery whatsoever after she filed suit against Dr. Zuckerman, even though Dr. Zuckerman propounded interrogatories to her requesting the name of her medical expert. Even after the motion for summary judgment was filed on the basis that Ms. Trotter lacked a medical expert and the hearing date was set for six weeks later, Ms. Trotter did not request any discovery or notice the deposition of any party. Instead, three days before the scheduled hearing, she filed a motion for continuance requesting additional time to conduct discovery. Under these circumstances, we find no abuse of discretion in the trial court's denial of Ms. Trotter's motion for continuance.

CONCLUSION

For the reasons assigned, the judgment of the trial court granting Dr. Zuckerman's motion for summary judgment and dismissing Ms. Trotter's claims against him is affirmed. Despite Ms. Trotter's pauper status, the costs of this appeal are assessed to her as the unsuccessful party. See La. C.C.P. arts. 2164 & 5188; ***Lake Villas No. II Homeowners' Association, Inc. v. LaMartina***, 15-0244 (La. App. 1st Cir. 12/23/15) (unpublished), writ denied, 16-0149 (La. 3/14/16), 189 So.3d 1070; ***State in Interest of EG***, 95-0018 (La. App. 1st Cir. 6/23/95), 657 So.2d 1094, 1098, writ denied, 95-1865 (La. 9/1/95), 658 So.2d 1263.

AFFIRMED.